(3)

No. 88-1125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

vs.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion if the notice requirement may be avoided by a court bypass system which both on its face and in actual practice meets the standards set forth by this Court for more burdensome parental consent statutes?

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Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case.

STATEMENT OF THE CASE

I. THE STATUTE.

The statute is set forth at 1a-4a of Petitioners' Appendix (hereinafter cited as "P.A.").

II. HISTORY OF THE LITIGATION AND FACTUAL RECORD.

A. Summary Judgment and Issues for Trial.

It is important that the factual record in this case and consequent findings of the district court be evaluated in the context of the district court's pre-trial order granting summary judgment and the framing of the issues for trial.

In an order issued January 23, 1985,[1] the district court granted summary judgment for defendants,[2] dismissing plaintiffs' claims that the Minnesota notice/bypass statute was facially invalid or violated equal protection standards under either the federal or state constitutions. P.A. 157a.

The district court acknowledged that the legal framework for this case was controlled as a matter of law by this Court's decisions in *Bellotti v. Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"); *H.L. v. Matheson*, 450 U.S. 398 (1981); and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). Thus the district court held that:

> The requirement of parental consent is more of a burden on a minor's right to choose an abortion than a requirement of parental notification. Thus, any parental notification/judicial bypass procedure which meets the Supreme Court's constitutional test established for parental consent/judicial bypass procedures is constitutional.
>
> . . . The Supreme Court, however, in *Bellotti II*, suggests that a state may require a pregnant minor to obtain both parents' consent to an abortion as long as it provides an alternative procedure whereby authorization for the abortion can be obtained. *Bellotti II, supra*, 443 U.S. at 648-49. *Accordingly, this court sees no constitutional infirmity with a two parent notification requirement.*

Summary Judgment Order P.A. 151a. (Emphasis added).

The district court reserved for trial the question of whether the Minnesota parental notification/judicial bypass system funtioned in accordance with the standards set forth in *Bellotti II*. Nonetheless, as petitioners note in their petition at 5, the district court found the notice/bypass statute facially invalid after trial. This holding was based, in substantial measure, upon a determination that, despite the prior holdings of this Court and the trial court's own summary judgment, the state should have proved by *factual* evidence that a parent notification/judicial bypass statute furthers proper public purposes.[3]

B. Parental Notification.

At trial much of plaintiffs' evidence concerning the alleged burdens of parental notification related generally to the incidence of dysfunctional families, divorce and intrafamilial violence and child abuse in the United States at large and in

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[1] Memorandum Order of the District Court, Alsop, J., dated January 28, 1985 (hereinafter "Summary Judgment Order"). P.A. 146a.

[2] Respondents will refer to the parties according to their posture at trial. Petitioners will be referred to as "plaintiffs," and respondents as "defendants."

[3] *See, e.g.*, District court order, P.A. 29a, 11a.

Minnesota. *See, e.g.*, A. 457-61,[4] T. 333-34, 984-85.[5] District court findings 68-70, P.A. 29a-31a.

The state does not dispute the existence of dysfunctional families or that there are minors in Minnesota who are victims of violence or fear violence. However, fear of abuse or interference with an abortion was not the most common reason for wishing to avoid parental notice. Of 258 minors appearing before Ramsey County Judge Peterson in judicial bypass hearings in the period from August 1, 1981, through November 30, 1982, only four percent indicated that they did not wish to notify their parents about their abortion because of fear that prior physical abuse would reoccur. Only five percent expressed an apprehension that parents would somehow prevent an abortion from taking place. Plaintiffs' Exhibit (P. Exh.) 21. The various reasons claimed by minors for not wishing to make their parents aware of their pregnancies and abortion decisions include a fear of disapproval and hostility, punishment, interference with her relationship with her boyfriend, upsetting a seriously ill parent and generally damaging the parent-child relationship. *See, e.g.*, A. 292-93; Hodgson Depo. of July 11, 1985, at 122;[6] P. Exh. 21. It appears, however, that a common, if not the most common, reason for the minor's desire to avoid parental notification is a general fear of damaging her good relationship with her parents. P. Exh. 21, A. 293. Dr. Hodgson herself testified that minors commonly seek to avoid parental notification as "a

[4] Page references preceded by "A." are to the Appendix filed in the Appeal to the Eighth Circuit.

[5] Page references preceded by "T." are to portions of the trial transcript not contained in the Appendix on Appeal to the Eighth Circuit.

[6] The testimony of Dr. Hodgson is found in the transcript of her deposition given for purposes of trial on July 11 and 12, 1985, and appears in the record as P. Exh. 92.

matter of love for their parents and they don't want to spoil the relationship that they have with their parents." Hodgson Depo. of July 11, 1985 at 122. Moreover, as testified by a number of witnesses, including Dr. Hodgson, adolescents often misapprehend their parents' likely actions in response to their decision to obtain an abortion. A. 228, A. 786-87, A. 879, A. 996-97. Dr. Hodgson likewise agreed with defendants' experts that notwithstanding the apprehensions of pregnant minors, parents are generally supportive in helping a minor deal with an unintended pregnancy. A. 229, A. 851-53, A. 866, A. 877.

Indeed, although parents of several thousand minors were notified of their daughters' decisions to have abortions pursuant to the statutory requirement from August 1, 1981, to March 1, 1986,[7] the record fails to reveal a single instance in which any such minor has suffered any violence or in which parents prevented any abortion as a consequence of notification.

Plaintiffs also criticized the requirement that both parents be notified on the ground that involvement of a second or noncustodial parent is unnecessary and can produce unwanted or disappointing consequences to the custodial parent or the minor. However, defendants' expert Dr. Vincent Rue, testifying as to his clinical experience in providing psychotherapy

[7] During this period 3,573 bypass petitions were filed in Minnesota courts. P.A. 23a. Both Dr. Hodgson (Hodgson Depo. at 122) and Paula Wendt (A. 312) testified that only about one-half of their minor patients choose the court bypass option. The actual figures offered by Wendt disclose, in fact, that only 40 percent of Meadowbrook minors have actually chosen the court option. A. 312. Since very few minors have been excused under the emancipation or abuse/neglect exceptions, it is reasonable to conclude that the number of minors who have notified their parents is at least equal to the number who sought court dispensation. *See also* Opinion of the Circuit Court. P.A. 83a n.9.

to minors confronted with problem pregnancies, stated that he has encouraged his pregnant minor patients to involve the noncustodial parent. When such advice has been followed, he has observed a subsequent improvement in the relationship between the child and the noncustodial parent. T. 2414-15.

C. The 48-Hour Length of the Parental Notification Requirement.

Plaintiffs also challenged the 48-hour length of the parental notification requirement. Plaintiffs' evidence pertinent to this particular challenge consists of evidence relating to medical risks associated with the postponement of an abortion procedure.

Minors who elect to notify one or both parents by written notice must wait until 48 hours after actual or consecutive delivery of written notice. Constructive delivery of mailed notice occurs at noon on the regular mail delivery date following mailing. Thus the effective length of the statutory parental notice requirement may in many instances be 72 hours.

It is undisputed that, all other things being equal, it is medically preferable to have an abortion at an earlier gestational age than at a later gestational age and that a second trimester abortion is statistically somewhat more risky and is in fact more expensive than a first trimester procedure. There is no evidence in the record, however, that a delay of 48 or 72 hours is medically significant. *See* District court finding 53. P.A. 23a. The district court found that the notice requirement, compounded by "scheduling factors," may reach a week or more. *See* District court finding 52. P.A. 22a-23a. The notice period can, however, run concurrently with any delays caused by scheduling factors, thus eliminating any compounding of normal scheduling delays. A. 158-59, T. 156-59, P. Exh. 70a, at 4, Opinion of the Circuit Court, P.A. at 97a. Furthermore, the record contains no instance in which delay for parental notification resulted in medical complication. Neither does public health data collected and published by the Minnesota Department of Health reveal any increase in medical complications among minors undergoing abortions while the notice/bypass was in effect. A. 827-28, D. Exh. 35.

D. Operation of the Court Bypass System.

A large volume of evidence was introduced dealing with the functioning of the court bypass procedure for minors who wished to secure relief from notification of one or both parents. During the period from August 1, 1981, to March 1, 1986, Minnesota courts entertained 3,573 petitions.[8] Based upon the experience of these thousands of hearings, the district court found as matters of fact that Minnesota courts applied the proper legal standard in ruling upon petitions (District court findings 29-32, P.A. 17a-18a); that hearings were systematically expeditious (District court findings 33-40, P.A. 18a-19a); and that anonymity was carefully safeguarded and breached at all only in a small number of isolated cases (District court findings 41-42, P.A. 19a-20a).

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[8] *See* note 7, *supra*.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT UPHOLDING THE MINNESOTA NOTICE/BYPASS STATUTE IS CONSISTENT WITH STANDARDS ALREADY ESTABLISHED BY THIS COURT AS A MATTER OF LAW.

While much remains uncertain concerning the permissible scope of state statutes touching upon abortion, this Court has clearly established that parents and society at large both have a strong, legitimate and long standing interest in promoting parental involvement in important matters involving their minor children, including abortion. The Eighth Circuit's decision upholding Minnesota's notice/bypass statute is consistent with the Court's clearly established standards, and the petition for certiorari should therefore be denied.

In numerous cases this Court has recognized the "cardinal" principle that parental involvement in the care and nurture of children is vital to the very structure of our society. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (mandatory public school attendance interferes with rights and duties of parents in care, nurture and education of children); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (mandatory school attendance until age 16 interferes with the rights and duties of Amish parents in the upbringing of their children). This cardinal principle is equally applicable to issues involving health care for a child,[9] including abortion. *See Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

[9] *See, e.g., Parham v. J.R.*, 442 U.S. 584 (1979) (hearing not required prior to parents admitting children to mental health facilities).

Despite the strength of these cardinal principles, however, in view of what was viewed as the "unique" and "nonpostponable" nature of the abortion decision, the Court has determined that the state may not go so far as grant a parent "an absolute and possibly arbitrary veto over the [abortion decision of a minor.]" *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). In *Bellotti II*, while the Court found invalid a Massachusetts law requiring parental *consent* for minors' abortions and providing for a form of court bypass procedure, Justice Powell, in announcing the judgment of the Court with the concurrence of three other Justices, went on "to provide some guidance as to how a state constitutionally may provide for parental involvement . . . in the abortion decision of minors."[10]

> . . . We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.
>
> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision re-

[10] *Bellotti II*, 443 U.S. at 651, n. 32.

quiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth*.

Id. at 643-44 (footnote omitted).

The concurring opinion of then Associate Justice Rehnquist underscores the intent of the plurality to establish, as a matter of law, criteria upon which states and lower courts could rely in enacting and identifying constitutionally valid statutes calling for parental involvement in minors' abortions. *Id.* 443 U.S. at 651-52.

The applicability of the *Bellotti II* plurality standard as a matter of law in judging parental consent statutes was subsequently squarely confirmed in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). In that case, Justice Powell noted that "the relevant legal standards with respect to parental-consent requirements are not in dispute." *Id.* at 490. *See also Id.* at 505 (O'Connor, J., concurring in part and dissenting in part).

Furthermore, in the only case to consider a statute merely requiring parental notice, the Court upheld a Utah statute requiring parental notice, but withheld judgment upon whether that requirement could be applied to a girl who was mature or emancipated. *H.L. v. Matheson*, 450 U.S. 398 (1981). It is clear, however, that a majority of the Court supported the concept of parental notification, at least if a court bypass option is available. *Id.* at 413-20 (Powell, J., with Stewart, J., concurring). *Id.* at 420-25 (Justice Stevens concurring).

These cases demonstrate that, as a matter of law, a state may require parental involvement, even parental consent, if it also provides an expeditious, anonymous procedure whereby a minor can demonstrate either sufficient maturity or "best interest" to permit avoiding that involvement. Nothing in the

Court's holdings in these cases has contained the slightest hint that their validity is dependent in any way upon case-by-case factual proof that parents in general are concerned with the welfare of their children, or that their involvement in the life crises and decisions of their children serves a proper and compelling purpose. To the contrary, these cardinal and fundamental principles are taken as given.

As pointed out above, the district court found, after a complete trial that the Minnesota statute with the bypass system in place conformed both on its face[11] and as applied with these standards.[12] The court concluded that Minnesota judges, hearing over 3,500 petitions, applied the appropriate legal standards, and the proceedings were, on the whole, properly expeditious and anonymous.[13]

In upholding the Minnesota law, the Eighth Circuit Court of Appeals has merely applied the legal standard established by this Court to the relevant facts found by the trial court. Therefore, this case does not present an appropriate occasion for the Court to rekindle uncertainty in the states and lower courts concerning the reliability of the Court's holding on such an issue.

II. THIS CASE PRESENTS NO NEW "FACTS" REQUIRING THE COURT'S CONSIDERATION.

Plaintiffs assert that the Court should review this case because it presents a "unique factual record," thereby implying that some hitherto unknown facts have been brought to light in the weeks of testimony reviewed at trial. However, plaintiffs' evidence does little more than reiterate matters of

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[11] Summary Judgment Order. P.A. 146a-157a.
[12] District court findings 29-42. P.A. 17a-20a.
[13] *Id.* District Court Conclusions of Law. P.A. 44a-45a.

fact and opinion already considered by this Court in prior decisions setting forth the standards for parental involvement in their minor children's abortions.

As was recognized by the Eighth Circuit, the cases of *Bellotti II*, *Matheson* and *Ashcroft* were not decided in an intellectual or sociological vacuum. P.A. 85a. This Court is well aware of and has given full consideration to the claims that some minors may be sufficiently mature to make the abortion decisions independently,[14] that there may be some parents who may obstruct the abortion decision,[15] that some parents may be abusive, and that not all parents would necessarily provide helpful communication and support.[16]

The Court has also considered the "burdens" that a judicial bypass procedure inevitably creates for pregnant minors and has found those burdens to be outweighed by the state's important interests in protecting the well-being of minors. Indeed, in *Ashcroft*, the Court held constitutional a judicial bypass statute which conformed to the requirements of *Bellotti II* in the face of uncontradicted testimony that the procedure "might well engender delays of 13 days or more, forcing many minors to pass into a later stage of pregnancy, thereby exposing them to substantially increased risks of morbidity and mortality," and despite apparently uncontradicted expert testimony that compliance with the judicial bypass procedure under the Missouri statute would increase the total cost of the abortion procedure for minors choosing the judicial bypass alternative.[17]

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[14] *See Bellotti II*, 443 U.S. at 628, 653.

[15] *Id.* at 647; *Matheson*, 450 U.S. at 438-39 (Marshall, J., dissenting).

[16] *Matheson*, 450 U.S. at 424 (Stevens, J., concurring) and 438 n. 24 (Marshall, J., dissenting).

[17] Reply Brief of Petitioners at 7-8, *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

Similarly, the Court in *Bellotti II* reviewed uncontradicted expert testimony that any judicial bypass proceeding, even if conducted in the most benign manner, could be detrimental to a teenager. The plurality was also fully mindful that even a judicial bypass procedure conforming to the standards laid down in *Bellotti II* would necessarily involve some procedural difficulties and some delay in the performance of an abortion with increased health risks to the minor.[18] Nonetheless the general rule is that the statute may require both notice and consent of parents prior to a minors' abortion at least so long as "mature" and "best interest" minors are not subject to absolute veto by their parents.[19]

The record reflects virtually no facts which would call for invalidation of the Minnesota statute, after some five years of operation. Rather, plaintiffs fall back upon the same alleged "burdens" which were already considered in prior cases. Moreover, for all their research and investigation, plaintiffs have failed to identify a single Minnesota minor who was prevented from having an abortion or who suffered any medical harm or parental abuse as a result of either notifying her parents or going to court.

Far from presenting a record which demonstrates that the principles embodied in *Bellotti II* and *Ashcroft* fail in practice, the instant case demonstrates that a statutory notice/bypass system patterned after the *Bellotti II*/*Ashcroft* standards can increase the potential for parental involvement[20]

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[18] Brief of Intervenor-Appellee Planned Parenthood League at 43, *et. seq.*, *Bellotti v. Baird*, 433 U.S. 622 (1979).

[19] *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981).

[20] One of plaintiffs' witnesses indicated that the percentage of parental notification had increased from 25% to 50% after the law took effect. P.A. 83a, n.9.

and provide effectively for a judicial alternative without causing constitutionally significant hardships for the minors involved.

III. THE TWO-PARENT NOTICE REQUIREMENT IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

In *Bellotti II* this Court addressed a Massachusetts statute which required the consent of both parents for a minor's abortion subject to a court-bypass mechanism. Justice Powell's opinion recognizes this fact and finds it permissible if a proper bypass system is available. 443 U.S. at 648-49. Furthermore, in *H.L. v. Matheson, supra,* the Court declined to find unconstitutional a statute which required notice to both parents but provided no specific court bypass option.

In neither of these cases did the Court suggest that the state is constitutionally limited to a one-parent requirement. Rather a majority of the Court agreed that a state may even require *consent* of one or *both* parents so long as an appropriate alternative to consent is in place.

It is not clear that a similar bypass mechanism is required in the case of mere notice.[21] However, if so, that mechanism was available in Minnesota and has operated to permit minors who had notified one parent to avoid notice to the second. Thus the Minnesota procedure, in this respect as well, fully complies with this Court's precedents.

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[21] *See* Cross-petition for certiorari, *State of Minnesota, et al. v. Hodgson, et al.,* also filed by the defendants in connection with this case.

IV. THE 48 HOUR NOTICE PERIOD IS CONSISTENT WITH THIS COURT'S PRIOR HOLDINGS.

In light of the purposes to be served by a notice requirement, it is clearly necessary that some reasonable amount of time be provided to permit those purposes to be served. *See,* District court finding 73, P.A. 32a. *c.f. H.L. v. Matheson,* 450 U.S. at 446 (Marshall, J., dissenting). Furthermore, the 48 hour wait can coincide with normal scheduling delays which routinely occur when minors set up their abortion appointments. *See* Opinion of the Eighth Circuit. P.A. 97a.

The Court in *Bellotti II* and *Ashcroft* approved statutes which required either parental consent or judicial dispensation. Under the Minnesota statute, the 48-hour notice requirement is not applicable where parental consent is obtained. Thus, under the Minnesota law, every minor has the same options as those upheld in *Bellotti II* and *Ashcroft.* In addition she has the less burdensome primary option of providing for parental notice. Therefore, the Minnesota statute is fully consistent with this Court's established standards.

CONCLUSION

Characteristics of a constitutionally permissible statute generally encouraging involvement of the parents in their daughters' abortion decisions have been explicitly spelled out by this Court, after having fully considered numerous claims concerning the reluctance of some minors, for any number of reasons, to involve their parents. Neither plaintiffs' argument nor the record of this case sheds any new light on these settled principles. The Minnesota statute has properly been found by both the district court and the circuit court to function in accordance with the criteria established by this Court. Thus, no purpose can be served by granting certiorari upon plaintiffs' petition.

For these reasons, the defendants respectfully urge the Court to deny certiorari in this case.

Respectfully submitted,

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